calls, carried by different interexchange carriers, that terminated on various AT&T local subscriber lines. In order to determine the accuracy of BellSouth's sorting process, AT&T must compare the information captured in the ADUF with the information AT&T recorded for each test call. Although the tests began the week of June 22, 1998, BellSouth failed to provide AT&T with the records for the test calls. Remarkably, when AT&T inquired why it had not received these files, BellSouth stated that it was unaware AT&T wanted them. Indeed, despite AT&T's renewed demand for these files, BellSouth still had not provided the information as of the date it filed its application. It thus has failed to demonstrate that it is capable of providing access usage data necessary to enable UNE purchasers to bill interexchange carriers for either originating or terminating exchange access on interLATA or intraLATA toll calls.

2. Terminating Usage Data for Reciprocal Compensation.

22. Similarly, BellSouth has never demonstrated that it is capable of providing the terminating usage information necessary to enable CLECs to determine the reciprocal compensation they are owed when they terminate local calls originated by other carriers. BellSouth, moreover, has not committed to, let alone implemented, any binding surrogate method applicable to all CLECs for reasonably approximating the reciprocal compensation to which purchasers of unbundled switching are entitled.

23. When a CLEC purchases unbundled local switching, it obtains, among other things, the functionality necessary to terminate calls, and incurs a cost whenever it uses that functionality to complete calls to its customers. Under the Act, when a CLEC terminates a local call that originated on the network of another carrier -- be it BellSouth's network, another CLEC's

facilities-based network, or another CLEC's UNE-based network -- the terminating CLEC is entitled to reciprocal compensation from the originating carrier. § 252(d)(2)(A). In order to collect reciprocal compensation for terminating such calls, therefore, a CLEC using unbundled local switching must obtain terminating usage data indicating how many calls/minutes its customers received and what carriers originated those calls. In its submission to this Commission, however, BellSouth does not claim that it possesses the capability to provide such information or that it is developing such a capability.

24. Instead, BellSouth argues that CLECs do not need terminating usage data for local traffic because "reciprocal compensation payments due from BellSouth are offset by payments due to BellSouth for CLECs' use of UNEs to terminate traffic. Because no payments are made for this traffic, no traffic data is provided." Varner Aff. ¶ 192. This suggestion, however, does not demonstrate that BellSouth is providing UNE purchasers with a reasonable surrogate for the information necessary to recover reciprocal compensation.

25. To begin with, BellSouth assumes that a CLEC using UNEs will always terminate local traffic that BellSouth itself originates. This assumption is simply wrong. In addition to calls that originate on BellSouth's network, AT&T could terminate calls that originate on the facilities-based or UNE-based networks of other CLECs. Mr. Varner fails to explain how the netting process he proposes would work for such calls. In such circumstances, AT&T is owed compensation by another CLEC, not by BellSouth.

26. More fundamentally, while arrangements to address this issue are possible, BellSouth has offered no evidence that it has legally committed itself to, and implemented, a

system or method that provides all UNE purchasers with a reasonable surrogate for the information they need to recover reciprocal compensation. Despite negotiations over arrangements that would enable UNE purchasers to recover such compensation, BellSouth and AT&T have never reached any formal agreement on the subject. And Mr. Varner cites no evidence that BellSouth has entered into any formal agreements with any other CLEC concerning reciprocal compensation arrangements for UNE purchasers. In these circumstances, BellSouth's incomplete and non-binding proposal provides no basis for a finding that BellSouth has enabled UNE purchasers to collect reciprocal compensation.

B. BellSouth is Not Providing Or Offering Nondiscriminatory Access To Customized Routing.

27. When a CLEC purchases the unbundled local switching element, it also obtains the right to use the capability of the switch to provide customized routing. *See Local Competition Order* ¶ 412 (in unbundling its local switching capability, a BOC must provide all "technically feasible customized routing functions provided by the switch"). BellSouth is not providing or offering this capability on a nondiscriminatory basis. To the contrary, BellSouth has proposed two methods of providing customized routing, each of which is discriminatory and competitively flawed. BellSouth's "interim" and allegedly "operational" method involves unnecessary ordering requirements that increase AT&T's costs and cause its orders to drop out of BellSouth's electronic systems. BellSouth's long-term method for customized routing has yet to be implemented and entails unacceptable levels of service-degrading post-dial delay.

28. AT&T plans to use its own operator services and directory assistance ("OS/DA") centers when it provides local exchange services. AT&T believes that its OS/DA centers are a

valuable asset that differentiate its services from those of its rivals, and that it is important to provide its own operator and directory assistance services to its local service customers. To accomplish this entry strategy, AT&T needs operator and directory assistance calls from AT&T local service customers to be routed from BellSouth's switch to AT&T's OS/DA centers. This can be accomplished by using either line class codes or Advanced Intelligent Network (AIN) architecture to provide what is variously called "customized" or "selective" routing of OS/DA traffic.

29. In its filing, BellSouth claims that customized routing "will be provided though BellSouth's proposed AIN-based Selective Carrier Routing Service upon successful completion of the trial of that service, and in the interim through line class codes to any requesting carrier." Varner Aff. ¶ 133. BellSouth asserts that it has completed work to provide customized routing using line class codes in Georgia, and that this method is now "operationally available." Affidavit of W. Keith Milner ("Milner Aff.") ¶ 82. AT&T's experience in Georgia, however, demonstrates that BellSouth has not provided customized routing using line class codes in a nondiscriminatory manner. In addition, trial tests of BellSouth's AIN methods reveals that this form of customized routing involves service degradations that render it discriminatory as well.

1. BellSouth is not providing customized routing using line class codes in a nondiscriminatory manner.

30. Using line class codes to provide selective or customized routing requires assignment of codes defining the "class of service" provided by each carrier and the appropriate routing of specific call types. Each switch must be programmed to recognize the line class code assigned to each of the lines served by that switch. For example, one line class code might

identify AT&T customers with basic residential service, whose calls to directory assistance or operator services should be routed to AT&T OS/DA centers. A different line class code would identify BellSouth basic residential customers, whose directory assistance and operator services calls would be routed to BellSouth operator and directory assistance services.

31. As Mr. Milner notes, BellSouth has completed work to provide line class codes for customized routing to AT&T's OS/DA centers for AT&T resale customers in Georgia. Yet in Georgia, BellSouth has imposed significant, unreasonable and discriminatory logistical hurdles to commercial use of such codes for customized routing. Specifically, BellSouth requires that, when AT&T orders customized routing for a particular customer, AT&T must identify the specific line class code for such routing used in the particular BellSouth switch that will serve that customer. This requirement is unnecessary, adds discriminatory costs and burdens to AT&T's ability to obtain customized routing through line class codes, and causes AT&T's orders to fall out of BellSouth's electronic systems.

32. Because of variations in switch vendor specifications and historical engineering practices, different codes (*e.g.*, four digits versus three digits, or numerical versus alphanumerical) may be used in different switches to designate the same class of service. For example, in one switch BellSouth may use one code to identify customers who wish to block 900 calls originating on their lines, and may use a different code to identify such customers in another switch. When BellSouth employees place orders for such a feature, however, they do not need to know the particular code used in each BellSouth switch. Instead, they simply enter the feature(s) the customer desires, and BellSouth's service order control system performs a table look-up to

correlate the desired feature(s) with the line class code used in the particular switch that serves the customer.

33. By contrast, BellSouth requires AT&T to identify, for each new customer, the switch-specific code used for customized routing to AT&T's OS/DA center. Because AT&T uses the industry standard Local Service Request form (LSR) to place orders for each new customer, it provides all the information BellSouth needs to determine and implement the appropriate line class code in the local switch that will serve AT&T's new customer. BellSouth, however, has refused to populate its look-up tables to enable its service order control system to perform the same feature correlation that the system performs for BellSouth's own customer orders. As a result, BellSouth has failed to provide AT&T with parity in access to customized routing, and instead forces AT&T employees to waste time performing table look-ups that BellSouth employees need not perform.

34. What makes this burden and consequent loss of efficiency especially improper, however, is that it ultimately does not enable BellSouth to process CLEC orders for customized routing electronically. Instead, the information process flow that BellSouth has designed for CLECs does not transmit the CLEC-provided information through to the organization that is responsible for implementing line class codes. This is because there is no field for identifying line class codes on the standard industry LSR, and BellSouth has never provided AT&T with any specifications for such a field.

35. BellSouth first suggested that AT&T provide switch-specific line class codes in the "Remarks" field of the LSR. Using the field in this fashion, however, meant that orders for

AT&T customers, although transmitted electronically, would drop out of BellSouth's electronic systems and would have to be processed manually. BellSouth subsequently indicated that AT&T would have to use a "feature" field on the LSR to identify the appropriate line class code, but this did not resolve the problem; the electronic interface in BellSouth's system would still cause AT&T's electronic orders to fall out for manual processing. BellSouth recently changed this interface, but as of July 9 had not yet explained how, in light of this change, AT&T is to place orders for customized routing, let alone permitted AT&T to test any such procedure. Based on AT&T's experience placing electronic orders for unbundled elements and orders associated with AT&T's "ADL" service, AT&T has every reason to expect that this new procedure will likewise result in AT&T's line class code orders falling out of BellSouth's electronic systems, and may even result in outright rejection of such orders.

36. Because AT&T already provides all the information BellSouth needs to identify the appropriate line class code, both the additional expense to AT&T and the barrier to efficient processing of orders for its customers are completely unnecessary and clearly discriminatory. BellSouth's failure to use the data it already has to provision orders for AT&T customers is certainly no basis for imposing additional costs on AT&T or other BellSouth competitors.

37. Second, AT&T may face a significant hurdle to migrating the thousands of local resale customers it has in Georgia to its OS/DA platform. In his affidavit, Mr. Milner suggests that AT&T could use a batch order process to perform such a migration. *See* Milner Aff. ¶ 84. To the best of my knowledge, however, BellSouth has never explained how this process will work

or what steps AT&T must take to initiate such a change order, despite AT&T's prior inquiries concerning such a process.

2. BellSouth is not providing customized routing using Advanced Intelligent Network.

38. BellSouth is not currently providing customized routing using AIN. Milner Aff. ¶ 86. As Mr. Milner admits, BellSouth and AT&T are still just "exploring use of AIN to perform selective routing." *Id.*

39. The AIN solution for customize routing involves three basic steps: 1) activation of the switch triggers; 2) development of service control point" ("SCP") database software that will provide routing instructions to the switch; and 3) establishing an administrative process for updating the SCP database. BellSouth no longer disputes the technical feasibility of using AIN to provide customized routing. Rather, the issue is implementation. Although BellSouth has stated in the past that it expected to make AIN available in Louisiana by the "second or third quarter of 1998" (*id.*), its affiants noticeably fail to provide any implementation date at all. *See* Milner Aff. ¶ 87; Varner Aff. ¶ 133.

40. In fact, AT&T and BellSouth jointly tested AIN-based customized routing in Georgia earlier this year. That test disclosed that BellSouth's method of implementing the AIN solution results in an unacceptable increase in post-dial delay -- *i.e.*, the period of time between the moment when dialing ends and the customer first hears ringing. BellSouth deploys its AIN SCPs in two basic configurations: individual end offices are linked to SCPs that contain software for "local" AIN applications, while tandem switches are linked to SCPs that contain software for more "regional" applications. BellSouth chose to deploy the customized routing application in its

"regional" SCPs, rather than at the "local" SCPs linked to each end office. As a consequence, when an AT&T customer places an operator services or directory assistance call, the end office where the call originates holds the call and establishes a connection with the tandem switch, which then queries the regional SCP for the call routing information. The SCP provides the routing instructions to the tandem, which then returns those instructions to the originating end office. The parties' joint testing revealed that, for Nortel DMS-100 and Lucent 5ESS switches, this processing added an average of 1 second delay for operator services calls, and an average of 2 seconds of delay for directory assistance calls. This reflects an increase of nearly 20% over the post-dial delay involved in BellSouth's own processing of operator services calls, and an increase of nearly 40% over the post-dial delay involved in BellSouth's own processing of directory assistance calls.

41. Mr. Milner blandly concedes that a one second delay "may be a concern for some customers." Milner Aff. ¶ 87. In fact, the Commission has concluded that "post-dial delay of 1.3 seconds is significant" to consumers, and could lead them to form a negative impression of the business they are calling. *In the Matter of Telephone Number Portability*, First Mem. Opinion and Order on Reconsideration, CC Docket No. 95-116, FCC 97-74, 12 F.C.C.Rcd. 7236 (March 11, 1997) ¶¶ 22-23. Moreover, even if customers could not perceive an increase in post-dial delays of one to two seconds, the Commission has correctly recognized that incumbent LECs may "discriminate against competitors in a manner that is imperceptible to end users, but which still provides incumbent LECs with advantages in the marketplace." *Local Competition Order* ¶ 224. In addition, because AT&T will pay usage-based rates for originating calls through unbundled

switching, modest increases in seconds of originating usage could, over time and thousands of calls, add up to significant costs that AT&T, but not BellSouth, will incur. These costs, of course, are in addition to the as-yet unquantified costs of "building and updating the database as end users change and query the database for call routing instructions." Milner Aff. ¶ 87.

42. To date, the parties have made no progress towards solving the post-dial delay problem. And, as BellSouth admits, it has yet to submit to the LPSC any rates for AIN-based customized routing, and will not do so until the "AIN solution is available." Varner Aff. ¶ 133. BellSouth's witnesses provide no estimates concerning when these milestones might occur. Until the problems of the AIN method are solved, that solution is tested and implemented, and rates for this method are approved, there is simply no basis for concluding that BellSouth's AIN proposal satisfies its obligation to provide customized routing. *See Ameritech Michigan Order* ¶ 55.

43. In short, BellSouth has failed to provide AIN-based customized routing at all, and has failed to provide such routing using line class codes in a nondiscriminatory manner.

C. BellSouth Has Unreasonably Restricted Access To All Features, Functions And Capabilities Of Its Switches.

44. The Commission has defined the unbundled local switching element to include "all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex." *Local Competition Order* ¶ 412. "Vertical features" include such popular services as Call Forwarding, Caller ID and Call Waiting, among others. Access to such features is one of the significant competitive advantages that new entrants obtain when they enter the local market by purchasing unbundled network elements rather than by reselling the incumbent's retail services: while a reseller is constrained by the incumbent's service definitions and tariff offerings,

the purchaser of unbundled network elements is free to use the switch to provide new services, combinations of services or capabilities that the incumbent has chosen not to offer.

45. Through its actions over the past year, BellSouth has deprived AT&T access to these features. Although its interconnection agreement with AT&T and its revised SGAT both purport to "offer all the functionality of its switches" (SGAT VI., A; *see also* Interconnection Agreement, Att. 2, § 7.1.1), BellSouth has refused to provide any features or combinations of such features beyond those that it offers to its own retail customers.

46. As part of the testing necessary to determine whether BellSouth can provide unbundled local switching, AT&T submitted on September 30, 1997, two preliminary test orders in Kentucky seeking to obtain certain features of BellSouth's local switch. In one of the orders, AT&T sought to obtain a feature known as "Call Hold." Call Hold is an individual feature that BellSouth's switches are inherently capable of providing.

47. BellSouth, however, refused to process this order. See Letter from Jill R. Williamson (AT&T) to Jo Sundman (BellSouth) (October 3, 1997) (Attachment 2). BellSouth stated that "Call Hold" was only available as part of a BellSouth retail service that included several additional features and would not be provided separately:

> Call Hold can be ordered in Prestige Communication Service (PCS) in the Kentucky GSST Tariff A.12.16. Call Hold cannot be ordered as a stand alone feature and is either ordered with User Transfer/Conferencing (A12.16.3.B.4) or with User Transfer/ Conferencing and Call Pickup.

Letter from Jo Sundman (BellSouth) to Jill R. Williamson (AT&T) (October 3, 1997) (Attachment 3). In a follow-up letter, BellSouth suggested that AT&T could initiate the

cumbersome bona fide request ("BFR") process to determine whether Call Hold could be provided without the other features offered in BellSouth's tariff. Letter from Jo Sundman (BellSouth) to Jill R. Williamson (AT&T) (November 3, 1997) (Attachment 4). Despite AT&T's repeated demands and inquiries over the following months, BellSouth neither offered Call Hold on an individual basis, nor provided any explanation for why it could not do so. Nor did it respond to AT&T's request for documentation on BellSouth's 5ESS and DMS-100 switches, and for business guidelines AT&T can use to make other features available. *See* Letter of Denise C. Berger (AT&T) to Jan M. Burriss (BellSouth) (March 5, 1998) Action Item No. 6 (Attachment 5).

48. In its submission, BellSouth states that, in its view, it is free to refuse to provide a CLEC with any features or functions that it does not offer at retail. Varner Aff. ¶ 125. Indeed, Mr. Varner asserts that BellSouth is not obligated to provide features that are "loaded and activated in the switch" if those features are not offered at retail. *Id.* ¶ 125, Fig. 1. Despite AT&T's repeated requests, moreover, neither Mr. Varner nor any other BellSouth affiant identifies any aspect of its switch processing that prevents BellSouth from providing Call Hold, or any other installed feature, on an individual basis.

49. Thus, BellSouth's own submission demonstrates that it is not providing unbundled switching in accordance with the requirements of the Act. The Commission has ruled that the local switching element "includes *all* vertical features that the switch *is capable* of providing," and that a purchaser of unbundled switching "obtains *all switching features* in a single element on a per-line basis." *Local Competition Order* ¶ 412 (emphases added). Mirroring these requirements,

AT&T's interconnection agreement defines unbundled switching to include "*all* of the features, functions, and capabilities that the underlying BellSouth switch that is providing such Local Switching function is then *capable* of providing." Interconnection Agreement, Att. 2, § 7.1.1 (emphases added). Despite these clear requirements, BellSouth admits that a purchaser of unbundled switching does not obtain all features that its switches are capable of providing -- *i.e.*, those features that are currently installed -- but rather only the subset of installed features that BellSouth offers to its retail customers.

50. This violation of the Act's requirements is not remedied by BellSouth's assertion that AT&T can obtain currently installed switch features through the BFR process. *See* Varner Aff. ¶ 126. To begin with, the BFR process is to be used only when AT&T "requests a *change* to any Service and Elements." Interconnection Agreement, Att. 14, § 1.0 (emphasis added). When AT&T seeks to deploy an installed feature of the local switch, it is not requesting any "change" in that switch at all. Rather, it seeks to use the current capabilities of the switch.

51. More fundamentally, requiring AT&T to employ the BFR process to obtain installed features is both discriminatory and anticompetitive. Under the BFR process, AT&T must submit a written request that "shall specifically identify the required service date, technical requirements, space requirements and/or such specifications that clearly define the request such that BellSouth has sufficient information to analyze and prepare a response." *Id.*, § 1.1. BellSouth may demand additional information, and has 30 days from the receipt of the request to provide "a *preliminary* analysis" of the request, unless "BellSouth determines that it is not able to provide AT&T with a preliminary analysis within 30 days," in which case the parties must

negotiate "a mutually agreeable date for receipt of the preliminary analysis." *Id.*, § 1.4 (emphasis added). Ultimately, BellSouth has up to 90 days from receipt of the request to provide AT&T "with a firm Bona Fide Request quote which will include, at a minimum, the firm availability date." *Id.*, § 1.5. Under the BFR process, therefore, BellSouth can take up to three months simply to announce when it will comply with a request. Its insistence that AT&T use this process to obtain features that are already installed in its switches is thus plainly discriminatory: AT&T must wait *months* to obtain currently installed features, whereas BellSouth can activate such features for itself in a matter of hours if not minutes.

52. The delays inherent in the BFR process likewise render BellSouth's requirement anticompetitive. First, the Commission permitted "an upfront purchase of all local switching features" in order to "speed entry by simplifying practical issues such as the pricing of individual switching features." *Local Competition Order* ¶ 423. By contrast, the BFR process plainly impedes the introduction of new services that BellSouth is not offering, or is not offering on an individual basis. Second, if AT&T determines that there are market needs or desires that BellSouth is not satisfying, AT&T cannot meet those needs without informing BellSouth of its competitive plans and then waiting months for BellSouth to process its request. In the meantime, BellSouth can introduce the new services and lock up customers while AT&T's request wends its way through the BFR process. AT&T will thus lose any competitive jump it would otherwise have in terms of service innovation.

53. In short, BellSouth has denied AT&T access to all of the features, functions and capabilities of the unbundled switch as required by the Act and the Commission's regulations.

D. BellSouth Has Failed To Demonstrate That It Can Provide Local Switching Unbundled From Local Loops.

54. BellSouth asserts that it has provided local switching unbundled from local loops in two separate instances in Louisiana, and in a total of 80 instances throughout its nine-state region. Milner Aff. ¶ 80. Mr. Milner provides no documentary or other support for this assertion, and I am not aware of any.

55. BellSouth's bald assertion that it has unbundled switching from local loops -- without any explanation of how unbundled switching is provisioned, or how the CLECs are using such switching to provide local service -- cannot possibly constitute evidence that BellSouth has provided nondiscriminatory access to this crucial unbundled network element in a commercially meaningful manner. Without such detail, it is impossible to evaluate the validity of BellSouth's claim. Moreover, it is clear from my earlier discussion that BellSouth is not capable of providing access to unbundled switching.

56. The importance of BellSouth demonstrating that it can provide unbundled local switching in a nondiscriminatory manner cannot be overstated. For instance, there are a host of logistical hurdles that must be cleared if CLECs with their own loops are to be able to connect those loops to BellSouth's unbundled switching element, and BellSouth has nowhere shown the methods and procedures, much less the technical ability, to allow such arrangements. It is essential that the Commission demand such a showing before finding that the checklist requirements have been satisfied. Otherwise, CLECs that are now pursuing the deployment of their own loops over alternative facilities -- such as, for example, C.A.T.V. facilities -- may never

obtain an opportunity to use those facilities in combination with ILEC switching, as Congress envisioned. This is too important an issue to overlook.

II. BELLSOUTH HAS REFUSED TO PROVIDE NEW ENTRANTS WITH RECIPROCAL COMPENSATION FOR AN IMPORTANT CATEGORY OF TRAFFIC.

57. Under the Act, BellSouth is obligated to establish reciprocal compensation arrangements for the transport and termination of traffic. § 271(c)(2)(B)(xiii). To be "just and reasonable," such arrangements must provide for the reciprocal recovery by each carrier of the costs associated with the transport and termination of calls that originate on the network facilities of another carrier. § 252(d)(2)(A). BellSouth has failed to comply with this requirement by denying that CLECs have any right to such reciprocal compensation for a significant category of traffic -- *i.e.*, traffic terminated to internet and other enhanced service providers ("ESPs").

58. Even assuming, despite the lack of any formal binding commitment on its part, that BellSouth will honor the right of UNE purchasers to recover some reciprocal compensation, BellSouth has nevertheless sought to deprive all CLECs, whether facilities-based or not, the right to recover reciprocal compensation for a significant amount of traffic. Specifically, BellSouth maintains that the traffic of internet and other Enhanced Service Providers ("ESPs") is not subject to reciprocal compensation because, in BellSouth's view, such traffic is interstate in nature. Varner Aff. ¶ 196; *see also* SGAT, § I.A. (defining "local traffic" as "the traffic types that have been traditionally referred to as `local calling' and as `extended area calling,'" and excluding "[a]ll other traffic that originates and terminates between end offices within a LATA boundary" from the definition). The Commission, however, has thus far concluded otherwise, ruling that internet

and other ESPs are "end-users." BellSouth is not free to overrule the Commission's determination and declare internet traffic non-local in order to escape its reciprocal compensation obligations.

59. The Commission ruled in 1983 that ESPs are "end-users" and that calls to ESPs terminate at their facilities, thereby characterizing ESP traffic as local in nature. *MTS and WATS Market Structure*, Memorandum Report and Order, 97 F.C.C. 2d 682 (1983). Like BellSouth, AT&T believes that ESPs generally use local switching and transport as part of a much more extensive transmission path, and that the vast majority of enhanced services applications are in fact interstate in character. Accordingly, AT&T has urged the Commission to rescind its earlier ruling, adopt a rebuttable presumption that ESP traffic is interstate, and require ESPs to pay cost-based access charges for such traffic.[2] Unless and until the Commission changes its earlier ruling, however, its characterization of internet and other ESP traffic is controlling, and entitles CLECs who terminate ESP traffic to reciprocal compensation.

60. By refusing to acknowledge the Commission's ruling, BellSouth has improperly denied AT&T and other new entrants a significant amount of reciprocal compensation to which they are due. As the Commission is aware, holding times on ESP traffic are, on average, considerably longer than most local calls.[3] Thus, a CLEC serving an ESP could expect to recover

---

[2] *See* Comments of AT&T Corp., *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switching Network by Information Service and Internet Service Providers*, CC Docket Nos. 96-262, 94-1, 91-213, 96-263 (March 24, 1997).

[3] In fact, in order to implement its policy on reciprocal compensation, BellSouth identifies CLEC customers with above-average holding times and then invokes its own presumption that the (continued...)

a significant amount of local compensation. (Alternatively, if ESP traffic is excluded from reciprocal compensation, a CLEC using unbundled switching will pay terminating switch usage on ESP traffic but will not receive an offset for this potentially significant amount of traffic under BellSouth's non-binding "offset" policy.) It appears, moreover, that BellSouth has adopted its policy concerning ESPs solely for the purpose of escaping its reciprocal compensation obligations. To the best of my knowledge, BellSouth does not prohibit ESPs from purchasing state-tariffed business lines or private lines on the ground that ESPs are not "local" service customers, nor does it report any of its business line revenues, expenses or investment as "interstate" on the basis of ESP use of those lines.

61. By adopting a unilateral policy of excluding ESP traffic from the Act's reciprocal compensation requirements, the BellSouth has failed to establish "just and reasonable" reciprocal compensation arrangements for the transport and termination of traffic. § 271(c)(2)(B)(xiii).

III. BELLSOUTH HAS ADOPTED A DISCRIMINATORY INTELLECTUAL PROPERTY RESTRICTION THAT UNFAIRLY BURDENS AND IMPAIRS AT&T'S ABILITY TO USE UNBUNDLED NETWORK ELEMENTS AND ELEMENT COMBINATIONS.

62. To provide "nondiscriminatory access" to unbundled network elements, an incumbent "must" abide by terms and conditions that are "equal to the terms and conditions under which the incumbent LEC provisions such elements to itself." *Local Competition Order* ¶ 315; *see also* 47 C.F.R. § 313(b). Further, the Commission has held that an incumbent LEC must

---

[3] (...continued)
customer is an ESP with interstate traffic. For such customers, BellSouth refuses to provide reciprocal compensation unless the CLEC can demonstrate that the ESP's traffic is predominantly intrastate.

make technically feasible modifications to its facilities when necessary to enable the incumbent to provide nondiscriminatory access. *E.g. Local Competition Order* ¶ 202; 47 C.F.R. §§ 51.5, 51.321(a). By claiming that its existing licenses with its vendors may not cover identical uses by CLEC of its unbundled network elements, however, BellSouth plainly violates these principles.

63. BellSouth has claimed that embedded in its facilities are potentially numerous intellectual property rights of third parties that will or may be violated if a CLEC is permitted to use those facilities. At the same time, however, BellSouth has disclaimed any duty to obtain the amendments to the licensing and other agreements with its equipment vendors that BellSouth believes would be necessary in order to provide CLECs with equal access to those facilities as network elements. BellSouth asserts that, in order to use the unbundled elements of its network, CLECs must negotiate with BellSouth's vendors on an ongoing basis to obtain any necessary licenses themselves. BellSouth's position prevents AT&T and other CLECs from using virtually all unbundled network elements without either facing the risk of liability for infringement of third party intellectual property rights or incurring the expense and delay of negotiating with, and making discriminatory payments to, an indeterminate number of third party vendors.

64. BellSouth disclosed its discriminatory third-party licensing requirement in proceedings MCI initiated before the Commission challenging the legality of another BOC's (SBC's) intellectual property requirements. *See In the Matter of Petition of MCI for Declaratory Ruling*, File No. CCBPol. 97-4, CC Docket No. 96-98. Like SBC, BellSouth claimed that "third party intellectual property rights are, or would be, implicated in at least some sales of unbundled network elements." BellSouth Reply Comments, *In the Matter of Petition of MCI for*

Declaratory Ruling, File No. CCBPol. 97-4, CC Docket No. 96-98 (May 6, 1997) at 3. BellSouth argued that it is the responsibility of AT&T and other new entrants to contact BellSouth's equipment and software vendors "and obtain from [these] third parties whatever licenses are necessary for [them] legitimately to" use those elements. *Id.* at 6. Since BellSouth filed these comments, AT&T has asked BellSouth to clarify whether it will provide unbundled local switching without forcing CLECs to engage in the costly process of negotiating with BellSouth's vendors to obtain right-to-use agrements for each feature and function of the switch. *See* AT&T Communications of the Southern States' Comments on BellSouth's Notice of Intent to File an Application for Authorization to Provide InterLATA Services in Georgia, *In the Matter of Consideration of BellSouth Telecommunications, Inc.'s Services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 6863-U (Ga. P.S.C. June 15, 1998) at 18 (Attachment 6); Letter of Steven C. Garavito (AT&T) to Victoria K. McHenry (BellSouth) (July 7, 1998) at 3 (Attachment 7). BellSouth has never responded to these inquiries, nor does it address this issue in its submission to the Commission.

65. AT&T believes that BellSouth, like other BOCs, has in fact exaggerated the intellectual property claims of its vendors. As the Commission has recognized, "incumbent LECs have little incentive to facilitate the ability of new entrants . . . to compete against them and, thus, have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete." *Local Competition Order* ¶ 11. BellSouth's claim that UNE purchasers bear the risk of infringement claims by third party vendors appears to be a classic example of these anticompetitive incentives at work. Indeed, it is

noteworthy that, for years, BellSouth and other LECs have provided customers with access to their network similar to the access required by the Act, yet, to my knowledge, none has ever claimed that such access violated any vendor's intellectual property rights.[4] In fact, this experience has led this Commission to conclude that the sharing of network facilities required by the Act is unlikely to infringe the intellectual property rights of other parties.[5] Now that BellSouth is being forced to provide such access to *competitors*, however, it has raised the specter that such access may result in infringement liability and seeks to shift the burdens of avoiding that liability to CLECs.

66. Nevertheless, even if BellSouth's claims are exaggerated or baseless, a CLEC cannot afford simply to ignore them. In the absence of information that only BellSouth possesses, a CLEC cannot be assured that its use of BellSouth's network elements will in no circumstances "implicate" the intellectual property rights of BellSouth's vendors, and no prudent entrant seeking to make large-scale commercial use of the equipment in BellSouth's network would blindly expose itself to the risk that such use may infringe one or more vendor's intellectual property rights. Thus, even if BellSouth's claims are wholly unfounded in reality, the prospect of having to litigate with one or more BellSouth vendors, with the attendant delays and uncertainties that accompanies litigation, is a clear barrier to use of unbundled network elements as a practical matter. BellSouth's position, therefore, effectively requires new entrants seeking to use

---

[4] *See generally* Comments of AT&T Corp., *In the Matter of Petition of MCI for Declaratory Ruling*, CC Docket No. 96-98 (April 15, 1997), pp. 22-28.

[5] *See* Report and Order, *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-237 (Feb. 7, 1997) ("*Infrastructure Sharing Order*").

unbundled network elements to contact and negotiate with literally dozens of BellSouth's vendors in order to obtain necessary legal protection.

67. The discriminatory and anticompetitive effects of BellSouth's position cannot be overemphasized. In virtually all cases, AT&T will not know what contractual provisions, if any, would need to be re-negotiated or modified. Those provisions appear in contracts to which AT&T is not a party and to which it has no access. Indeed, in its comments to the Commission last year, BellSouth offered no assurance that it would provide such information to new entrants such as AT&T. Instead, BellSouth indicated that it would contact the third party holder of intellectual property rights to allow that party "to determine whether its rights are implicated by a requesting carrier's access to a network element and whether an existing agreement with a[n] ILEC would permit such access." BellSouth Reply Comments at 7.

68. Even assuming new entrants can identify the relevant contractual provisions, if any, that must be re-negotiated, as "captive customers" new entrants will have nowhere near the bargaining power BellSouth possessed when it chose its vendors and negotiated licensing rights to vendor intellectual property. As a dominant purchaser in a competitive market, BellSouth was able to obtain favorable intellectual property rights from its vendors. Once that intellectual property is embedded in BellSouth's network, however, new entrants have little if any bargaining leverage with the vendors BellSouth chose. In effect, each of BellSouth's vendors is a monopolist vis-a-vis new entrants, because new entrants have no choice but to purchase the intellectual property of that particular vendor. Moreover, given their ongoing relationships with BellSouth, and the significant amount of business BellSouth controls, vendors will have strong incentives to

curry favor with BellSouth and are thus vulnerable to pressure, be it explicit or implicit, to make competitive entry more difficult and expensive. Some vendors may therefore flatly refuse to negotiate with new entrants; those that do negotiate can be expected to demand fees in excess of those they charged BellSouth and/or to impose limitations beyond those that govern BellSouth's use of its equipment. At a minimum, then, the need to identify potentially problematic contracts and negotiate with entrenched vendors guarantees that new entrants will face substantial delays that BellSouth does not face.

69. BellSouth's position also ensures that new entrants will pay a discriminatory price for using unbundled network elements. First, new entrants are forced to pay twice for the same intellectual property rights. Because the costs of intellectual property licenses and rights-to-use are included in the prices BellSouth charges for its network elements, AT&T purchases those rights when it pays BellSouth for each unbundled network element. By refusing to pass those rights on to new entrants, BellSouth forces new entrants to subsidize its use of the elements and also to purchase those same rights again from the vendors themselves. Second, this additional fee is not merely duplicative of the portion of the element price that already includes the costs of intellectual property rights. Given their lack of bargaining power, new entrants will pay more than BellSouth paid to obtain the same rights. Third, the necessity of negotiating with dozens of vendors for rights that new entrants should obtain when they purchase unbundled network elements imposes additional and improper transaction costs, including the costs of delay. As a result, BellSouth's position not only ensures that new entrants will incur substantial added costs

that BellSouth does not bear, but violates the underlying principle of Section 251(c)(3) that BellSouth's unique "economies be shared with new entrants." *Local Competition Order* ¶ 11.

70. BellSouth's attempt to force CLECs to re-negotiate and amend the terms of numerous BellSouth contracts imposes discriminatory obstacles to the use of network elements that are every bit as damaging to competition as any other restriction not founded on technical feasibility. The nondiscriminatory alternative is straightforward. BellSouth, not new entrants, must negotiate with BellSouth's vendors and obtain the license or contract modifications, if any, necessary to permit CLECs to use those elements free of the threat of infringement claims, and going forward it must cease agreeing to include any such limitations in any new agreements it may enter into with its vendors. Given its superior access to its own contracts and its existing relationships and bargaining leverage with its vendors, BellSouth can both identify and negotiate satisfactory resolutions to intellectual property issues far better than new entrants, who lack both the necessary knowledge and bargaining power.

71. In addition, and even more fundamentally, BellSouth's recognition of its obligation to secure rights-to-use for third parties would eliminate the incentives it otherwise has to invent specious claims of potential infringement in order to retard competitive entry. The Commission adopted this precise approach in the analogous context of section 259 of the Act, which requires ILECs "to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services." 47 U.S.C. § 259(a). There, the Commission held that "whenever

it is `the only means to gain access to facilities or functions subject to sharing requirements,' section 259 requires *the providing LEC to seek, to obtain, and to provide necessary licensing*, subject to reimbursement." *Infrastructure Sharing Order* ¶ 9 (emphasis added).

72. Unless and until BellSouth agrees to "to seek, to obtain, and to provide" any license modifications necessary to permit CLECs to use unbundled elements, AT&T and other new entrants cannot use network elements or combinations on terms "equal to the terms and conditions under which the incumbent LEC provisions such elements to itself." *Local Competition Order* ¶ 315. Although AT&T seeks to use the elements and combinations in BellSouth's network in the same manner as BellSouth, it will incur substantial costs and experience delays that BellSouth itself will not incur or experience. As a consequence, BellSouth has improperly burdened and impaired AT&T's ability to use network elements, and has violated its duty to provide access to unbundled network elements on "terms and conditions that are just, reasonable nondiscriminatory." § 251(c)(3).

CONCLUSION

73. In sum, BellSouth continues to prevent CLECs from entering its local exchange market through use of unbundled network elements. BellSouth has yet to provide access to unbundled local switching, either by flatly refusing to allow new entrants to deploy inherent and fully operational features of the switch; by failing to develop and implement commercially meaningful methods of providing critical switch usage data; or by "offering" capabilities of the switch only on wholly discriminatory terms and conditions. In addition, BellSouth denies UNE purchasers (or any other CLECs) the right to collect reciprocal compensation on a significant